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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1960

No. 811

AGNES KELLY O'TOOLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Judgment Sought To Be Reviewed	1
Jurisdictional Statement	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Reasons and Argument for Issuance of Writ	3
Conclusion	8
APPENDIX A—Decision of Honorable Albert L. Reeves, *U. S. D. J.*	9
APPENDIX B—Opinion of United States Court of Appeals for the Second Circuit	22
APPENDIX C—Petition for Rehearing and Petition to Court to Sit *In Banc* on Said Rehearing	31
APPENDIX D	36

Cases Cited

Chaika v. Vandenberg, 252 N. Y. 101	5
Christie v. Vineburg, Inc., 259 N. Y. 159	5
Ferris v. Sterling, 214 N. Y. 249	5
Hennessy v. Walker, 279 N. Y. 94	5
Hukey v. Massachusetts Bonding and Insurance Company, 277 A. D. 411	5
Mandelbaum v. United States of America, 251 Fed. 2d 748	6
Mark v. City of Ormond, 113 F. Supp. 504	7
Norris v. Kohler, 41 N. Y. 42	5

PAGE

Orlando v. Pioneer Barber Towel Supply Co., 239 N. Y. 342 5

Piwowarski v. Cornwell, 273 N. Y. 226 5

Williams v. United States, 350 U. S. 850 ..... 2, 4

Winnowski v. Polito, 294 N. Y. 159 5

Other Authorities Cited

28 U. S. C. Sec. 1652 3

28 U. S. C. Sec. 2674, 62 Stat. 983 2

U. S. C. A., Section 1652 7

New York Vehicle and Traffic Law, Section 59 3

5 Moore Fed. Practice 43.08, Second Edition 7

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Judgment Sought To Be Reviewed

Petitioner, Agnes Kelly O'Toole respectfully petitions for a writ of certiorari to review the judgments against her in the United States District Court, Eastern District of New York, and in the Second Circuit Court of Appeals. The opinion in the Second Circuit Court of Appeals is reported 284 Fed. (2d) 792. The opinion in the United States District Court is not reported officially. However, copies of both opinions are included in the appendix.

Jurisdictional Statement

The judgment sought to be reviewed was entered on December 2, 1960. A petition for rehearing was duly and timely filed. The rehearing was denied on January 3, 1960. Copy of the order denying rehearing is included in the appendix. Jurisdiction to review the judgment in question is conferred upon this court by 28 U. S. C. Sec. 1254(1).

Questions Presented

1. Does the decision of this court in *Williams* v. *United States,* 350 U. S. 850, construing the Federal Tort Claim Act and holding that the state law, where the tort occurred, controls rather than any general federal law, include also state procedural law where such procedural law would be outcome-determinative of the result?

2. Are the presumptions and burden of proof provided for under New York law available to the plaintiff on the trial of a Federal Tort Claim?

3. Did the courts below ignore part of the New York statute in determining this case?

4. Did the government's proof amount to substantial evidence sufficient to overcome the presumptions created by New York law?

Statutes Involved

28 U. S. C. Sec. 2674, 62 Stat. 983:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

28 U. S. C. Sec. 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

Section 59 of the New York Vehicle and Traffic Law:

> "Negligence of operator other than owner attributable to owner. Every owner of a motor vehicle or motor cycle operator upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner".

Statement of the Case

This action was brought by petitioner in the District Court of the United States, Eastern District, under the Federal Tort Claims Act 28 U. S. C. Sections 1346, 2671, *et seq.*

At the time of the alleged tort, petitioner was a passenger in a motor vehicle owned by the United States of America and operated by an alcohol tax unit employee, one, Andrew Cunningham. The negligence of Cunningham was established and the ownership of the car by the United States of America was admitted. There was conflicting testimony on behalf of the government as to the extent of the permission granted to Andrew Cunningham. In the Examination before Trial, the government witness testified that Cunningham did not have to return the car until the Monday after the Friday evening on which the tort occurred. On the trial the government produced a superior

officer of Andrew Cunningham who testified that he was instructed to return the car at 6 P. M. on the Friday evening in question which was before the time that the tort occurred. Under the New York statute the owner of a motor vehicle is responsible for the operation of said motor vehicle in the business of such owner, or otherwise by any person legally using or operating the same with the permission, expressed or implied of said owner. New York Vehicle and Traffic Law, Section 59. In addition, under the New York law, independent of this statute, there is a presumption that a person operating a motor vehicle is doing so with the permission of the owner of said car. Under New York law, when ownership is conceded a *prima facie* case is made out for plaintiff and the burden of proof shifts to the defendant to overcome the said presumption by substantial evidence.

Neither the trial judge nor the Circuit Court of Appeals gave the petitioner the benefit of this presumption. It is submitted that this presumption is outcome-determinative of this case and that if the trial court or the Court of Appeals took into consideration this presumption that the verdict would have to be for petitioner.

In view of the fact that the Federal Tort Claims Act is a relatively new statute, it is in the public interest that this court clearly determine the applicability of state procedural law where such procedural law is outcome-determinative for the guidance of all in cases under the Federal Tort Claims Act.

Reasons and Argument for Issuance of Writ

Prior to this court's decision in *Williams* v. *U. S.*, 350 U. S. 850, there was considerable difference of opinion among the various federal courts as to the applicability of state law in the trial of cases arising under the Federal

Tort Claim Act. In the *Williams* case this court squarely held that state law is applicable. It is now necessary to determine whether this court's decision in the *Williams* case was intended to include state procedural law such as presumptions and burden of proof when such procedural law is outcome-determinative of the case at bar. Under New York law the owner of a motor vehicle is responsible for the operation of said motor vehicle whether in the business of such owner or otherwise by any person legally using or operating the same with the permission, expressed, or implied, of such owner. Section 59 New York Vehicle and Traffic Law.

Judge Medina writing the opinion for the Court of Appeals elected to ignore and did not pass on the meaning of the word "otherwise" in the New York statute. See appendix page 30.

In addition to the New York statute it has always been the law in the State of New York that there is a presumption arising from admission of ownership that the car is being operated with the permission of the owner. In fact, this presumption is equally applicable to horse drawn vehicles. *Norris* v. *Kohler*, 41 N. Y. 42. The Court of Appeals of New York has consistently and repeatedly sustained this presumption and has held that the plaintiff makes out a *prima facie* case by proving ownership of the car in so far as permission to operate it is concerned.

Ferris v. *Sterling*, 214 N. Y. 249;
Orlando v. *Pioneer Barber Towel Supply Co.*, 239 N. Y. 342;
Chaika v. *Vandenberg*, 252 N. Y. 101;
Piwowarski v. *Cornwell*, 273 N. Y. 226;
Hennessy v. *Walker*, 279 N. Y. 94;
Winnowski v. *Polito*, 294 N. Y. 159;
Christie v. *Vineburg, Inc.*, 259 A. D. 342;
Hukey v. *Massachusetts Bonding and Insurance Company*, 277 A. D. 411.

In fact, the United States Circuit Court of Appeals in an earlier case *Mandelbaum* v. *United States of America*, 251 Fed. 2d 748 at page 751 correctly stated the New York law as follows:

> "The New York Court of Appeals, in Chaika v. Vandenberg (252 N. Y. 101, 169 N. E. 103), has held that there is a presumption that the owner of a vehicle is responsible for the manner in which the vehicle is driven. This presumption continues until there is 'substantial evidence' to the contrary. Thus, in the instant case the plaintiff made out a prima facie case by proving government ownership of the truck and the District Court's view to the contrary was erroneous.
>
> But we are urged that, in any event, there was 'substantial evidence' introduced to rebut the presumption, and therefore the error below was harmless. We do not agree.
>
> Several New York cases have considered this requirement of 'substantial evidence'. They indicate that even where the owner and driver testify without contradiction as part of the defendant's case that the driver had no permission or was out of the scope of employment, the case should still go to the trier of fact, and if that evidence of interested witnesses is disbelieved the presumption has not been overcome. (Winnowski v. Polito, 294 N. Y. 159, 61 N. E. 2, 425; Pinowarski v. Cornwell, 273 N. Y. 226, 7 N. E. 2d 111; Hukey v. Mass. Bonding & Ins. Co., 277 App. Div. 411, 100 N. Y. S. 2d 643, 3d Dept., 1950 leave to appeal denied 302 N. Y. 949, 96 N. E. 2d 621; see also Parisc v. Towse, 2 Cir. 45 F. 2d 962; cf. St. Andrassy v. Mooney, 262 N. Y. 368, 186 N. E. 867.)"

A reading of the opinions of Judge Reeves in the District Court and Judge Medina in the Court of Appeals, both of which are in the appendix, clearly indicate that the petitioner was not given the benefit of the presumption and burden of proof as established by New York law. This is particularly important in the case at bar because

the government's proof is contradictory as was set forth in Judge Medina's opinion. One government witness having testified that the car did not have to be returned until three days after the tort occurred and the other government witness testifying that the car should have been returned several hours before the tort occurred. Clearly such contradictory evidence on behalf of the government's witness is not the substantial proof referred to in the New York cases which would overcome the *prima facie* case made out by the petitioner.

Both Judge Reeves and Judge Medina proceeded on the theory that there was no presumptions in favor of the petitioner and assumed that the entire burden of proof was on the petitioner when in reality petitioner had already made out a *prima facie* case and the burden was on the government to disprove the presumption created by New York law. In addition, both Judge Reeves and Judge Medina ignored the Rules of Decision Act contained in Section 1652 of the U. S. C. A. which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

See also 5 Moore Fed. Practice 43.08 Second Edition and *Mark* v. *City of Ormond,* page 113 F. Supp. 504.

This issue is of vital importance to the entire administration of and litigation under the Federal Tort Claim Act and it would be in the public interest for the Court to grant this petition so that these questions may be clarified.

CONCLUSION

The court should grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit herein.

Respectfully submitted,

C. JOSEPH DANAHY,
Attorney and Counsellor for Petitioner,
44 Court Street,
Brooklyn, New York.

March 17, 1961.

APPENDIX A

Decision of Honorable Albert L. Reeves, *U. S. D. J.*

[425] Brooklyn, New York
June 11, 1958

Appearances:

C. Joseph Danahy, Attorney for Plaintiff, by Bernard E. Perelson, Esq., of Counsel.

Cornelius W. Wickersham, Jr., United States Attorney, for the Eastern District of New York, by Lawrence Nusbaum, Jr., Assistant United States Attorney.

[426] The Honorable Albert L. Reeves: I will tell you what I think about the case.

The fact that this accident resulted, is to this Court an unhappy situation, an unfortunate situation, and there is no question in my mind but that the plaintiff received serious and substantial injuries. There are no controversial questions on that, she was disabled and in the hospital, and she was there from the morning of the injuries on January 6, 1951, until early in June, and while, as stated by counsel, the 15th of June, and it is not important, but my recollection is that she said she was discharged from the hospital about the 6th of June. However, as I say, that is not important here in the case.

The main question in the case, and that is before we reach the question of damages, is whether or not the government is liable in the case.

Now, let us see what the facts are in the case.

The Witnesses who testified on behalf of the plaintiff, were herself, of course, she was the first witness, then Dr. Wolff, and Dr. Wolff covered the subject of her injuries. He made an examination, it was in this year, I think that was the time of his [427] examination, he made

an examination and he told how severely she was injured and that her injuries were permanent.

I should now like to discuss the facts: There is the admission by the government, and it was read into evidence, that this automobile belonged to the government.

Now, Miss Kelly has told, and, as I say, she told about the evening before, how it was spent, and finally how it came to the point where the collision occurred or the accident occurred.

I am sure you will remember that she had cautioned the driver that he was running too fast and he made some comment that they would soon be home, and then she noticed that he made a quick turn, or there was a turn to the left, I believe, well, anyhow, he ran up on the sidewalk and struck a wooden telephone pole and electric light pole.

Then followed Mr. Penney. He was from the hospital and he testified how much the hospital bill was, and he said there was $1794.50. Miss Kelly had insurance, and much of that was paid until there was a balance due from her of approximately $700, all of which she would be entitled to recover if the [428] judgment is rendered against the government.

Then, Joseph Merkel was called and testified. He was the police officer, he came to the scene of the accident and he told about what he observed there. Both parties, Miss, now Mrs. O'Toole, Miss Kelly then, and Mr. Cunningham were there; and the police officer told of both of them being in the automobile in the front seat and both being unconscious.

So there is no controversy about her condition and the very fact that Mr. Cunningham, the unfortunate driver of the car was killed.

Then the deposition of Mr. Daners was read in evidence, and I got the impression from something which was said that he was in the courtroom, but that is beside the ques-

tion. As I say, the deposition was read and he testified about getting the automobile, about how they had come in from some investigation in the northern part of the state and how they received the automobile to take their baggage home. Counsel has well said, and it is my recollection, that he said that they would return the automobile Monday morning when they came back to work.

Dr. Regal was called, and he was the eye expert, he testified about Miss Kelly's right eye and the [429] effects of it, and there was not any particular controversy about the question, there is no controversy but that she suffered serious injuries to her right eye.

Now, on behalf of the defendant, I am just going over the testimony of these witnesses, there was Dr. Alexander O. Gettler. Now, he is the chemist, he is the man who testified that he had examined the liver, I believe it was, of Mr. Cunningham, and that it showed 35 per cent alcohol, and that condition, he said, would produce intoxication. Furthermore, Dr. Gettler said that a person with that amount of alcohol would stagger and would not have control of himself.

Then there was Mr. Whitman, who testified that he was one of the owners of a bar, and he testified about the parties who came to his place and how they drank some, and it is my recollection he said that it was in his place where Mrs. O'Toole wrote this postcard or these postcards and gave some to him. She said she had no recollection about that.

Then there was Mr. Connelly, and it is my recollection he was a bartender. His testimony corroborated other testimony about their drinking and [430] he also said how long they were in his place of business.

Then Mr. Collins testified. He was the defendant, as I remember, in a suit that Mrs. O'Toole brought or Miss Kelly, it was then, brought against him because of the accident which occurred on October 21, 1952.

Then Mr. Carroll testified, and Mr. Carroll said that he was in charge of the various parties who were identified as being employed by the Alcohol Tax Unit and that Mr. Cunningham was one of these who was under him, and, as I recall, Mr. Danar was under him, too.

Mr. Carroll said how they had come back from work in Sullivan County, and I am not familiar where that is, but that is not important, and he said that they came back about 2 or 2:30, that they had their luggage and that they borrowed the automobile, the government automobile, and that he permitted them to take it with the promise, so he said, on the part of Mr. Cunningham that he would have the automobile back by six o'clock, before six o'clock in the afternoon of January 5th.

Mr. Carroll further said that they were not [431] assigned to any work, that they were off duty from that time until Monday morning, at which time they would return to their duties.

Now, I think that is important. His testimony is important on the previous conversation with Mr. Cunningham and his conversation with Mr. Cunningham was to the effect that he said that Mr. Danar was not present and that he spoke to Mr. Cunningham, who said the automobile would be back by six o'clock that evening and that it was under those circumstances he permitted the car to be taken out.

Then Mr. Alexander Puntorno was called. He is the person named Al who came into the first bar with the plaintiff, and his girl friend, and as I gather from the testimony he was a friend of Millie. He testified about how long they were there and how many drinks they had and my recollection is that he was of the definite opinion that he didn't want to go to another place but that Miss Kelly finally persuaded him to go. But that is not important whether he wanted to go or not, they all went.

Then Dr. Degen testified, he was called this morning, and it is my recollection he had examined the plaintiff probably in May of 1953, and the object [432] of his testimony was to indicate that he treated the family, and I recall counsel made the objection that some of his testimony was privileged, and that wasn't my viewpoint. I don't want to discuss this matter of privilege, I don't want to discuss the law now but let me say in passing that the law has been repeatedly affirmed that where a litigant comes into court, exposing her injuries and claiming hurts from an accident, that then she opens the whole door, and then even her own private physician might be called to testify about her condition. Of course, we are all familiar with the privilege rule that where a doctor receives a communication from a patient as the basis for his treatment, then his lips are closed. The object of the law is, and I am not discussing the philosophy of it, the object of the law is to enable a sick patient to feel fully at ease, take her doctor into her full confidence and to tell him all the maladies she has, some of which the public ought not to know about.

There then appeared Mr. Celestino, Mr. Charles Celestino. He was part owner of one of the places that were visited, and he remembered about the incidents, he was there.

[433] Now, I recall counsel said that all of these bartenders and owners testified that he was not drunk, but they did not testify, that he, Mr. Cunningham, was drunk.

Mr. Louis Lauria then testified, and he was the bartender.

Then the last witness, Mr. Sarner, then testified. Mr. Sarner has been in the courtroom. He told us about all of his connections with the government and how on February 5 of 1951 he took a statement from the plaintiff. She was then in the hospital, and he said that he asked her questions about the hours which had not theretofore been accounted for satisfactorily to him and that she answered the

questions and he wrote down her answers and then read the answers to her, and then later on gave her this statement, the compilation of all of her answers, that she read it, initialed it, and upon that basis I felt that her statement ought not to be stricken.

Now, very briefly, aside from the documentary proof, I have gone over the testimony of the named witnesses who testified on both sides in the case.

Now, there cannot be any question as to the [434] collision and there is no question that it was a serious one and there is no question that it was a government-owned automobile. There can be no question about that.

On that particular point, I believe the New York Courts and the Federal Courts are bound by the decision that there must be substantial testimony to overcome or to show that the automobile was in use by the government at the time. Now, then, it is for me to say whether there was substantial testimony, so let us go back to Mr. Carroll.

Mr. Carroll, I thought, was a fair witness. He was vigorous in his testimony, and I was unable to discern any contradictions in his testimony and I was impressed that he was attempting to tell the Court what the truth was in the case. He told us preliminarily about Mr. Cunningham coming back with Mr. Danar, they having finished their work which they had completed in upstate New York, that their work for the time was complete and that they had no more assignments. Assignments may have been made, but they were subsequent.

Furthermore, it was testified that they were subject to call 24 hours a day, as counsel has pointed [435] out.

Mr. Carroll furthermore said that the automobile was to be returned to the government garage, but because they had heavy baggage they borrowed the car. A proper interpretation of his testimony is that Mr. Cunningham borrowed the car, borrowed the car from the government but it was a government car, the government owned the car.

but it was borrowed with the distinct understanding, so he said, that he would return it before 6 o'clock on that day.

We all know that Mr. Cunningham didn't do that, and in my opinion, I am saying nothing against Mr. Cunningham, he is dead; we must not disturb the peace of his grave by saying anything about a man who can't answer for himself, he is gone, but we have Mr. Carroll's testimony, which is substantial testimony, that Mr. Cunningham had borrowed the car from the government.

Now, whether Mr. Carroll had a right to loan the car, I wouldn't say that he did, that is for that reason, that he loaned it to him for the purpose of taking his baggage home and then with the understanding that he would return the car.

Now, if Mr. Cunningham had run into somebody [436] on the way home, although he was not engaged in any mission for the government, performing any service for the government, he was simply using a borrowed car, then there might be a different question, but he did not do that, he did not return the car at six o'clock but on the contrary, according to all the testimony that never happened.

Now, he borrowed the car at 2:30, approximately, in the afternoon. He could have returned it, according to the evidence, he could have returned the car back to its place after he had taken his baggage, as far as driving was concerned, in fifty minutes, in that time he could have driven the car back.

Mr. Carroll said that he understood that Mr. Cunningham wanted to change clothing, probably take a bath, he had been out on duty for a long time, and that he didn't expect him back soon, but he did expect him back before 6 o'clock.

The car was not returned. The inference from all the testimony is that Mr. Cunningham did not go to his own home. I am inferring from that, maybe I am wrong about

it, that his baggage, his luggage was still in the car. That is an inference that I have drawn from the testimony.

[437] Anyhow, he did not go home.

Between 2:30, when he took Dr. Danar home, which must have meant about 4 o'clock when he got there, from that time, between 4 o'clock and half past five or 6 o'clock when he met Millie and the plaintiff, that period of time is not accounted for. However, they met pretty early.

Then they all began going from one place to another, and there can be no reason to doubt that Mr. Cunningham was drinking heavily, there can be no question about it. That all of the testimony shows. Some evidence is that he had as many as seven beers and part of he left, as counsel said, in the glass, didn't drink it all.

However, the witness, Dr. Gettler, said that the quantity of alcohol they found in his liver had reached the point of intoxication where he was not in control of his faculties. Dr. Gettler, I felt, was a fair witness and was substantiated by other witnesses.

I have commented on Mr. Carroll's testimony because clearly in my judgment the question as to whether Mr. Cunningham at the time of this accident was using the car with the presumption that it was [438] being used on behalf of the government stands and falls on that testimony: The testimony is that it was not being used on behalf of the government at that time because Mr. Cunningham was taking this young lady, the plaintiff, home.

Perhaps I should comment on that further here. He, Mr. Cunningham, had borrowed the automobile, and assuming he was authorized to drive it and take his baggage home, assuming that, nevertheless the government automobile was not to be used as a jitney, and that is not his word, that we are all familiar with the word jitney, it is a taxicab that sort of specializes, well, it is usually run at the time of strikes and times like that, and as I understand it, jitneys are conveyances which haul people for a small com-

pensation. It is not proper to have a government automobile used for the purpose of transporting people from barrooms or anywhere else to their homes. The car should not have been used in that capacity.

I am mindful now of the Savage case, to which able counsel has called my attention. That is the case which was reversed because the Court put the burden upon the government to show that there the car [439] was in use on behalf of the government. Judge Inch had said that the presumption is that a car under such circumstances was being used for purposes of the government and that under the rules of the Courts of New York it would take substantial testimony to overcome that presumption.

Here I just want to say that this was said when I was on the Supreme Court of my state by a very able judge who preceded me and whom I admired very much, he said, "The presumption is there were bats of the law flitting in the twilight but disappearing in the sunlight of full facts."

Now, it is not as easy as this under the New York law. The New York law says that there must be substantial testimony in order to overcome the presumption under the vehicle law, the Motor Vehicle Law.

Anyhow, without commenting too much further, let me say I am going to digress from the doctrine of deviation, which is hardly here, and I am referring to deviation as in the Savage case. In that case Savage was sued, but he was not made a party. He testified on the part of the plaintiff. He was in the truck. Now, the burden was placed upon the [440] plaintiff to prove more than the presumption of the law, that is, that it was in use for the government at the time.

I do not wish to proceed on that score further.

Furthermore, I will not comment on Mr. Cunningham, it would not become me and I have no desire to do that. It is for the judge to be impartial and fair and not only to state the facts but weigh the facts.

I should comment further on Dr. Gettler's testimony. Dr. Gettler is a man whom I regarded as a fair and good witness, a highly educated man, he testified from long experience and observation that the quantity of alcohol found in the viscera or the liver of Mr. Cunningham was enough to deprive him of judgment and would make him make mistakes, make him unfit, as I inferred from the testimony, to drive an automobile.

That was corroborated by the plaintiff when she said that starting from the last place he was driving too fast and she cautioned him. Then, the next thing she knew was, why, the automobile had overturned.

As far as the record shows, there is no reason for the overturn of the automobile except that this man [441] had lost control of his faculties.

That was the testimony of Dr. Gettler.

I am mindful of what Mr. Perelson has said here. Mr. Perelson said that the bartenders, the saloon men did not say that he, Mr. Cunningham, was drunk and that plaintiff did not say that he was drunk. However, Dr. Gettler said he found in his viscera or in his liver a sufficient quantity of alcohol to render him drunk, and, as I inferred from the testimony, irresponsible.

Now, I am mindful of what Mr. Nusbaum has said about the assumption of danger, the assumption of risk. I think counsel, of course, has objected to that. I think what counsel had in mind was that a plaintiff is negligent if she does not use her eyes and her own negligence and that she, Mrs. O'Toole, knew or might have known that her escort that night, Mr. Cunningham, was intoxicated.

I could not find anything else but that he was intoxictaed, and that is confirmed by not only Dr. Gettler, by what Dr. Gettler said, but it is confirmed by all of these people who said he had been drinking heavily.

How much Mr. Cunningham had drunk between 4 o'clock and 6 o'clock when he joined these people, we [442] cannot

tell, but I am taking Dr. Gettler's testimony that he was intoxicated.

She knew that he was intoxicated, she knew he had been drinking all evening, and when he started the automobile at a rapid speed, in his answer to her, according to her testimony, he stated that, "I will soon get you home," and that would indicate there was a measure of irresponsibility at the time.

Now, that is wholly aside from the fact that government cars cannot be allotted to the function of taking somebody home.

I will say this, that as in the Savage case—I call it the Savage case because it is hard to pronounce the names—as in the Savage case, where he hit somebody, if Mr. Cunningham had hit another automobile on the way, then I am not sure but that there might have been recovery, even though it was a borrowed automobile and was not, according to Mr. Carroll, was not being used for any function for the government at all, for any purpose that the government used such automobiles, but it had been borrowed by Mr. Cunningham for the sole purpose of taking his baggage home because his baggage was heavy.

[443] I must find what I believe the testimony shows, and therefore I must find that Mr. Cunningham was intoxicated.

I find that the plaintiff is negligent in going into that car. She had been with him all night, and when I say all night, I mean from approximately 6 o'clock in the evening until 1 o'clock the next day. She knew about the drinking, she knew how many drinks she had and he had, and so it is my thought she knew or should have known that there was a measure of irresponsibility, and that was proved by the fact that he was starting to run too fast and without any cause whatever turned the automobile and ran into an electric light pole.

There is substantial testimony to show that the automobile was not in use on behalf of the government at the time but that it had been loaned by Mr. Carroll to Mr. Cunningham for a private purpose, of taking his baggage home, and that therefore this automobile was being used wrongfully—I shouldn't say wrongfully, maybe Mr. Carroll had a right to loan it, I assume he had a right to allow Mr. Cunningham to take his luggage home, perhaps that was part of the function of the automobile, perhaps part of the [444] function of the government in lending the automobile. Nevertheless, the deviation in this case was so marked, at the time he did not have his master's purpose in mind so that the deviation was sufficient to deprive the plaintiff of any judgment.

The judgment of this Court on motion to dismiss made by the Government is that the motion be granted, his issue is sustained.

I find the issue is for the Government and find that it be the duty of the Court to sustain the motion of the Government to dismiss at the conclusion of all of the testimony.

Now, then, Mr. Perelson, if I can help make up any record, I know how—

Mr. Perelson: I will just take an exception to your Honor's ruling.

The Court: Of course, you don't have to take any more exceptions, there was a time when you took exceptions.

Mr. Perelson: I realize that. After thirty years you get used to taking exceptions.

The Court: Yes, exactly, and if I were to practice, I would say the same thing.

Now, I wish the government would prepare, and I [445] assume from what Mr. Perelson has said that there might be an appeal in the case, without an appeal it is not necessary for me to prepare a findings of fact or state conclusions of law, but I know it is the practice to do that, and will you do that, Mr. Nusbaum?

Mr. Nusbaum: I shall, your Honor.

The Court: Submit a copy to Mr. Perelson.

Mr. Perelson, you will, of course, have the right to tell me—well, you submit all what you think I should find, what conclusions you feel I should find.

Mr. Perelson: We will.

The Court: You also furnish a copy to Mr. Nusbaum.

You will give me copies and I will pass on them because it is my duty to make findings of fact and state conclusions of law.

All right, that is the way I want you to do that.

Thank you, gentlemen, for your very considerable courtesy to me and the very able way in which both sides tried your cases. You tried them diligently and with fine ethics, and I say that to both sides. Thank you for it.

[446] I also express the wish that in sitting in a case I could decide for both sides, but that, unfortunately, is impossible.

Mr. Perelson: Thank you, your Honor.

Mr. Nusbaum: Thank you, sir.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

EMANUEL KARR,
Official Court Reporter
U. S. District Court for the
Eastern District of N. Y.

APPENDIX B

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 73—October Term, 1960

(Argued November 3, 1960 Decided December 2, 1960.)

Docket No. 25378

AGNES KELLY O'TOOLE,

Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

SWANN, CLARK and MEDINA,

Circuit Judges.

Plaintiff appeals from a judgment of the United States District Court for the Eastern District of New York. Albert L. Reeves, *Judge.**

In an action under the Tort Claims Act, 28 U. S. C. Sections 1346(b), 2671 and 2674, arising out of injuries sustained by plaintiff through the negligence of an investigator of the Alcohol and Tobacco Tax Unit of the Internal Revenue Service in driving an automobile owned by the government, plaintiff appeals from a judgment dismissing her complaint. Opinion below not reported. Affirmed.

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* Sitting by designation.

C. JOSEPH DANAHY, Brooklyn, New York (Bernard E. Perelson, Brooklyn, New York, on the brief, *for plaintiff-appellant.*

CORNELIUS W. WICKERSHAM, JR., United States Attorney for the Eastern District of New York, Brooklyn, New York (Margaret E. Millus, Assistant United States Attorney, Brooklyn, New York, on the brief), *for defendant-appellee.*

MEDINA, *Circuit Judge*:

In the early hours of the morning of January 6, 1951 plaintiff was seriously injured when a government-owned automobile operated by Andrew Cunningham, an investigator assigned to the Alcohol and Tobacco Tax Unit of the Internal Revenue Service, left the highway, ran up on the sidewalk and struck a wooden telephone pole. Cunningham was pronounced dead on arrival at a hospital. The accident happened as he was driving plaintiff to her home after an evening spent visiting a number of bars and drinking beer. The trial judge found that the accident was caused by Cunningham's negligence, that he was intoxicated, and that plaintiff was guilty of contributory negligence and assumed the risk of driving with him "in his inebriated condition." The complaint was dismissed and plaintiff has appealed.

We do not find it necessary to consider the question of contributory negligence or assumption of risk. The principal contentions advanced by appellant are:

(1) That the trial judge erroneously applied the New York law; and

(2) That, in any event, any finding of substantial evidence to rebut the presumption arising out of Section 59 of the New York Vehicle and Traffic Law must rest on the testimony of the witness Walter Carroll, and that his testi-

mony should not have been received because the government did not produce him as a witness in response to the demand served in connection with the taking of depositions before trial.

Cunningham and Theodore C. Daners, another agent of the Alcohol and Tobacco Tax Unit, were sent to participate in the raid of a still in Liberty, New York. They returned on January 5, 1951, and reported to their supervisor, Walter Carroll, at the Manhattan office of the Unit about 2:00 P. M., bringing the baggage they had used on the trip to Liberty, which was heavy and bulky. This was a Friday. They received their pay checks and, according to the finding of the trial judge, based on Carroll's testimony, Carroll granted Cunningham's request to borrow the government-owned automobile, later involved in the accident, for the sole purpose of taking his baggage to his home, about a 25-30 minute drive from the government garage. "This permission was granted upon the explicit and specified stipulation * * * that the car be returned to the government garage by 6:00 P. M. on January 5, 1951, immediately after depositing the luggage at Cunningham's home." (Finding No. 10.)

Instead of going home, Cunningham proceeded to visit a few bars and he was at Deviney's Bar in Astoria when he was joined by appellant and some other friends at about 6:30 P. M. The rest of the evening was spent going from one bar and grill to another, drinking and "socializing," until Cunningham and appellant finally left the Canary Cage Bar and Grill in Corona shortly before the accident.

It is suggested that perhaps Cunningham was for at least part of the time engaged on official government business. But the testimony of the various bartenders and that of other witnesses concerning the activities of appellant and Cunningham demonstrates beyond shadow of doubt that he was during the entire evening bent on his own pleasure and recreation and engaged on no government business whatever. Moreover, Carroll testified and the trial judge

found as a fact that Cunningham was employed as an agent in the Enforcement Division of the Unit, in contrast to the Permissive Division "which deals with bar and grill violations." He was off duty until the following Monday morning, and, under the applicable regulations, would not have been permitted in a bar and grill without the permission of a superior and unless accompanied by a member of the Permissive Division.

The relevant statutes, 28 U. S. C. Sections 1346(b), 2671 and 2674, and Section 59 of the New York Vehicle and Traffic Law (now Section 388) are set forth in the margin.[1]

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[1] 28 U. S. C. § 1346(b) provides in pertinent part as follows:

"Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U. S. C. § 2671 provides in pertinent part as follows:

"As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

[Continued on page 26]

As 28 U. S. C. Section 1346(b), generally referred to as the Tort Claims Act, is the source of authority to sue the United States in cases of this type, it is arguable that the District Court has no jurisdiction unless plaintiff proves that the government employee whose wrongful act or omission causes personal injury or loss of property, was at the time "acting within the scope of his office or employment." In other words, the statute was susceptible of the interpretation that the words "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" were applicable and the government was subject to suit only in cases where the government employee was "acting within the scope of his office or employment," any state law to the contrary notwithstanding. Indeed, this was the precise holding in *Williams* v. *United*

[Continued from page 25]

'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

28 U. S. C. § 2674 provides in pertinent part as follows:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

New York Vehicle and Traffic Law, § 59 provides in pertinent part as follows:

"Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner."

States, D. C. N. D. Cal. 1952, 105 F. Supp. 208.[2] On appeal the Ninth Circuit affirmed, 1954, 215 F. 2d 800, but the rationale of the decision was different. It was held that ordinarily the law of California would govern but that with reference to members of the military and naval forces the federal statute, 28 U. S. C. Section 2671, applied, as that section defined "acting within the scope of his office or employment" to mean "acting in line of duty," with reference to members of the military and naval forces. This ruling was reversed by the Supreme Court, 1955, 350 U. S. 857, in the following brief *Per Curiam*:

> "This case is controlled by the California doctrine of *respondeat superior*. The judgment is vacated and the case is remanded for consideration in the light of that governing principle."

This decision by the Supreme Court disposed of the contention that the phrase "acting within the scope of his office or employment" was to be interpreted as matter of federal law. And state law was held to be controlling despite the fact that the jurisdiction of the United States District Courts over the United States as a defendant was limited to cases where the claim for damages for injuries to person or property was based upon the alleged wrongful act or omission of a government employee "while acting within the scope of his office or employment." But nothing was said, nor in the context of the facts of *Williams* was

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[2] See also *United States* v. *Sharpe*, 4 Cir., 1951, 189 F. 2d 239; *United States* v. *Eleazer*, 4 Cir., 1949, 177 F. 2d 914, also purporting to apply federal law, and *Clemens* v. *United States*, D. C. D. Minn., 1950, 88 F. Supp. 971, which applied state law. However, most of the cases decided before the decision of the Supreme Court in *Williams* v. *United States*, 1955, 350 U. S. 857, did not state a choice of law rule. See, e.g., *United States* v. *Campbell*, 5 Cir., 1949, 172 F. 2d 500; *Murphy* v. *United States*, W. D. N. Y., 1953, 113 F. Supp. 345; *Parrish* v. *United States*, M. D. Ga., 1950, 95 F. Supp. 80.

there any occasion to say anything, on the subject of whether or not, if state law imposed liability beyond the scope of the doctrine of *respondeat superior*, the United States could be held liable under the Tort Claims Act.

The interpretation of the Tort Claims Act by the Supreme Court in *Williams* has been applied by us in *Mandelbaum* v. *United States*, 2 Cir., 1958, 251 F. 2d 748.

Appellant contends that the trial judge in the case now before us misapplied the New York law as elaborated in *Mandelbaum;* and she also contends that the words "or otherwise" in Section 59 of the New York Vehicle and Traffic Law require a holding of liability here wholly apart from the doctrine of *respondeat superior*, and that the trial judge in effect read these words out of the statute and thus again misapplied the New York law.

In *Mandelbaum* the driver of the government-owned truck, named Savage, was a member of the armed forces stationed at the Fort Hamilton army base in Brooklyn. He had been working daily at Fort Tilden, also on Long Island, and about five miles from Fort Hamilton. On the day of the accident he was told to use a truck instead of a passenger car and hence was not allowed to follow his usual route to Fort Tilden on the Belt Parkway. He claimed he got lost, went across one of the bridges to Manhattan, and came back. In any event, he was headed away from Fort Hamilton when the accident occurred. The trial judge in dimissing the claim against the government had held that Mandelbaum had not sustained the burden of proof that the driver of the car "was acting in the line of duty at the time of the incident" and that proof that the government owned the truck created no presumption that Savage was acting in the line of duty. In reversing, we held New York law governed, that under Section 59 (now Section 388) of the New York Vehicle and Traffic Law as interpreted by the New York Court of Appeals there is a presumption that

"the owner of a vehicle is responsible for the manner in which the vehicle is driven," and that this presumption continues until it is rebutted by "substantial evidence." Hence, in *Mandelbaum* the mere proof of ownership did give rise to a presumption and the view of the law governing the case as stated by the trial judge turned out to be wrong. This is the basis for the reversal and the remand.

It is to be noted that Section 59 imposes liability resulting from negligence in the use or operation of the vehicle "in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied of the owner." We are told by appellant that this language can only mean one thing, namely, that once the automobile was delivered into the possession of Cunningham he was necessarily using it with permission and the government must be liable whether or not at the time of the accident he was using it in government business, because the statute reads "in the business of such owner or otherwise."[3] Differently expressed, it is appellant's contention that under New York law if the owner of an automobile permits someone else to drive it and if that someone else drives it negligently and causes damage, the owner is liable no matter what restrictions or limitations were put upon the use of the car. The answer to all this is that such is not the New York law. On the contrary, the New York Court of Appeals in *Chaika* v. *Vandenberg*, 1929, 252 N. Y. 101, held that there is no "permission, express or implied," if the car is used for a prohibited purpose. In that case the defendant-owner of the car gave his son permission to drive the car from Floral Park to Westbury, Long Island, and the son drove to New York City instead, where the accident occurred. See also *Hinchey* v. *Sellers*, 1959, 7 N. Y. 2d 287.

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[3] We cannot find any discussion in the briefs in *Mandelbaum* relative to the interpretation or effect of the words "or otherwise."

As the trial judge in the case before us, on substantial evidence, found that Cunningham's permission to use the car was for a specific purpose and for a limited time and that that he used it for a different purpose and for many hours after he was told to return it to the government garage, the New York law as above stated disposes of the case.

As the finding just above noted was based largely upon Carroll's testimony, appellant tells us that Carroll's testimony was objected to and should have been excluded. The alleged reason for this is that he was not produced in response to the demand for the production of witnesses for the taking of pre-trial depositions. The short answer is that Carroll had retired and was no longer employed by the government at the time of the service of the notice. Accordingly, he was not subject to government control and was subject to subpoena by either party.

Perhaps some day under the Tort Claims Act there will arise a case where state law imposes liability upon the owner of an automobile who permits another to use it, whether or not it is used in the owner's business and whether or not it is used at a time and for a purpose specifically forbidden by the owner. See *United States* v. *Taylor*, 6 Cir., 1956, 236 F. 2d 649. But for the rulings of the New York Court of Appeals construing Section 59 of the New York Vehicle and Traffic Law this might have been such a case. But it is not such a case; and we have no occasion to pass upon appellant's argument based upon the words "or otherwise" in Section 59.

Affirmed.

APPENDIX C

Petition for Rehearing and Petition to Court to Sit *In Banc* On Said Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 25378

AGNES KELLY O'TOOLE,
Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,
Defendant-Appellee.

Plaintiff-Appellant's petition for rehearing of her appeal herein, which was decided on December 2, 1960, in an opinion rendered for this court by Circuit Judge Medina and petition for the court to sit *in banc* on said rehearing.

The grounds for said rehearing and the petition to the court to sit *in banc* on said rehearing are as follows:

1. This court, with Judges Swan, Clark and Medina sitting, have determined the New York law in the case at bar differently than this court with Judges Hicks, Lumbard and Waterman sitting determined the New York law on the same subject in *Mandelbaum* v. *United States of America*, 251 Fed. 2d 748.

2. This court did not consider the fact that until Cunningham, the government employee returned the motor vehicle to the defendant, he was its agent, servant and

employee for the purpose of physically returning the motor vehicle to the United States. Under both the decision of this court in *McConville* v. *U. S.*, 197 F. 2d 680, cert. denied 344 U. S. 877 and the decision of the Court of Appeals in *Riley* v. *The Standard Oil Company of New York*, 231 N. Y. 301, a rehearing on these questions should be granted and this court should sit *in banc* so that the judgment appealed from may be reversed.

I.

THE DECISION IN THE CASE AT BAR AND THE DECISION OF THIS COURT IN MANDELBAUM V. UNITED STATES OF AMERICA, 251 FED. 748, DETERMINING THE LAW OF THE STATE OF NEW YORK ARE IN CONFLICT.

The learned Judge, who wrote the opinion of this court in the case at bar, set forth the New York law as follows at page 328:

> "On the contrary, the New York Court of Appeals in Chaika v. Vandenberg, 1929, 252 N. Y. 101, held that there is no 'permission, express or implied', if the car is used for a prohibited purpose. In that case the defendant-owner of the car gave his son permission to drive the car from Floral Park to Westbury, Long Island, and the son drove to New York City instead, where the accident occurred. See also Hinckey v. Sellers, 1959, 7 N. Y. 2d 287."

The learned Judge, who wrote the opinion for this court in *Mandelbaum* v. *United States of America*, 251 Fed. 2d 748, at page 751, stated the New York law as follows:

> "The New York Court of Appeals, in Chaika v. Vandenberg (252 N. Y. 101, 169 N. E. 103) has held that there is a presumption that the owner of a vehicle is responsible for the manner in which the vehicle is driven. This presumption continues until there is 'substantial evidence' to the contrary. Thus, in the

instant case the plaintiff made out a prima facie case by proving government ownership of the truck and the District Court's view to the contrary was erroneous.

But we are urged that, in any event, there was 'substantial evidence' introduced to rebut the presumption, and therefore the error below was harmless. We do not agree.

Several New York cases have considered this requirement of 'substantial evidence'. They indicate that even where the owner and driver testify without contradiction as part of the defendant's case that the driver had no permission or was out of the scope of employment, the case should still go to the trier of fact, and if that evidence of interested witnesses is disbelieved the presumption has not been overcome. (Winnowski v. Polito, 294 N. Y. 159, 61 N. E. 2d 425; Pinowarski v. Cornwell, 273 N. Y. 226, 7 N. E. 2d 111; Hukey v. Mass. Bonding & Ins. Co., 277 App. Div. 411, 100 N. Y. S. 2d 643, 3d Dept., 1950, leave to appeal denied 302 N. Y. 949, 96 N. E. 2d 621; see also Pariso v. Towse, 2 Cir. 45 F. 2d 962; cf. St. Andrassy v. Mooney, 262 N. Y. 368, 186 N. E. 867."

The essential difference between the New York law, as stated in the case at bar, and the New York law as stated by this court in the *Mandelbaum* case, is that the burden of proof is on the defendant to prove by substantial evidence that no agency existed. As this court stated in the *Mandelbaum* case at page 752:

"If the burden were on plaintiff, as the judge below mistakenly thought, to prove that Savage was in the scope of his employment, we certainly could not say that the determination made had been clearly erroneous. (Rule 52-a Fed. Rules Civ. Proc.) But, as we have indicated, the burden of disproving agency by substantial evidence was upon the defendant."

The admissions made by defendant in the Examination Before Trial that no time limit had been set on the return

of the motor vehicle and the testimony of Carroll that the motor vehicle should have been returned by 6 P. M. on the day in question, takes on altogether different probative values if the plaintiff has the burden of proving agency or if the plaintiff makes out a *prima facie* case once it proves ownership of the car as was held by this Court in the *Mandelbaum* case.

It is submitted that the law of the State of New York in its procedural aspects and elements should be considered in determining what is the law of the State of New York. See article "Procedural Elements of State Law in Federal Courts", Volume 69, Harvard Law Review, page 66. See also article on State Law in Federal Courts, Yale Law Journal, Volume 55, pages 267-296.

It is submitted that in view of the conflict between the case at bar and the *Mandelbaum* case as to what the New York law is, that the petition for reargument should be granted and that the court should sit *in banc* so as to clarify and resolve this question.

II.

THIS COURT DID NOT CONSIDER THE FACT THAT UNTIL CUNNINGHAM, THE GOVERNMENT EMPLOYEE RETURNED THE MOTOR VEHICLE TO THE DEFENDANT, HE WAS ITS AGENT, SERVANT AND EMPLOYEE FOR THE PURPOSE OF PHYSICALLY RETURNING THE MOTOR VEHICLE TO THE UNITED STATES.

Under both the decision of this Court in *McConville* v. *U. S.*, 197 F. 2d 680, cert. denied 344 U. S. 877 and the decision of the Court of Appeals of the State of New York in *Riley* v. *The Standard Oil Company of New York*, 231 N. Y. 301, it is respectfully submitted that a rehearing on these questions should be granted and that this Court should sit *in banc* so that the judgment appealed from may be reversed.

Petition for Rehearing and Petition to Court to Sit In Banc On Said Rehearing

Until such time as Cunningham returned the motor vehicle owned by the government to the government garage he was its servant, agent and employee for the purpose of physically returning the said motor vehicle. Under any view of the evidence in the case, at the time that the accident happened Cunningham had concluded his frolic and was driving in the direction of the government garage in Manhattan. Both the New York law and the law laid down by this Court hold that where a chauffeur diverts to business of his own he is a servant, agent and employee for the purpose of returning the motor vehicle to the owner after he has concluded his own business. *Riley* v. *The Standard Oil Company of New York*, 231 N. Y. 301; *McConville* v. *U. S.*, 197 F. 2d 680, cert. denied 344 U. S. 877.

CONCLUSION

It Is Respectfully Requested That a Rehearing Be Granted and That the Court Sit in Banc Upon Such Rehearing and That Decision and Judgment Under Review Be Reversed.

Respectfully submitted,

C. Joseph Danahy,
Attorney for Plaintiff-Appellant,
44 Court Street,
Brooklyn 1, N. Y.

Certificate of Attorney

The undersigned, as member of the Bar of this Court and as attorney for plaintiff-appellant, hereby certifies that this petition is presented in good faith and not for delay.

Dated: Brooklyn, New York,
December 13, 1960.

C. Joseph Danahy,
Attorney for Plaintiff-Appellant,
44 Court Street,
Brooklyn 1, New York.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

AGNES KELLY O'TOOLE,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

PETITION FOR REHEARING

Petition denied.

T. W. S.
C. E. C.
H. R. M.
U. S. C. *JJ.*

January 3, 1960

PETITION FOR REHEARING IN BANC

All of the active judges concurring, except Judge Moore who took no part in the consideration of this matter, the petition for rehearing in banc is denied.

J. EDWARD LUMBARD
Chief Judge

January 3, 1960